

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of:)	
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
Federal-State Joint Board)	
On Universal Service)	CC Docket No. 96-45
)	
Universal Service Administrative Company)	
Request for Guidance)	
_____)	

**COMMENTS OF
XO COMMUNICATIONS SERVICES, INC.**

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SUMMARY

USAC describes its Guidance Request as seeking guidance on the use of “post-dated certificates” from resellers. However, USAC’s sparse description does not adequately or accurately relate the questions the Commission should answer. The Commission should not rule on the question as described by USAC, and instead should address the questions described below, which more fully identify both the immediate and the long-term issues that are presented.

First, the Guidance Request fails to accurately summarize the immediate question that requires an answer. USAC’s Guidance Request withholds the key fact that the sworn declarations at issue were presented only because USAC, for the first time ever, proposed to reclassify as “end user” revenue, revenues from resellers *confirmed* to have contributed to the Universal Service Fund (“USF”) during the audit period – thereby assessing both the wholesale and end user revenue in violation of Section 254. The sworn declarations were submitted as further evidence to demonstrate that USAC’s reclassification would result in double payment. The immediate question, therefore, is, “***May USAC lawfully ignore sworn declarations that a customer has paid USF contributions on the revenues in question and knowingly double collect USF contributions on the same revenue?***” XOCS submits that the answer to this question clearly is “No.”

More broadly, USAC’s Guidance Request relates to the obligation of USAC to consider “other reliable proof” submitted by a filer to support its classification of revenues as reseller revenues. As to this issue, USAC inaccurately portrays the situation as one in which a filer seeks to *substitute* a sworn declaration for a lack of reseller verification procedures. However, the actual situation is one where a filer merely seeks to *supplement* (not replace) its evidence regarding its reseller verification procedures with additional proof to show that its

classification is justified. Thus, the question is whether USAC is obligated to consider sworn declarations from customers *in addition to* other evidence of the filer’s reseller verification procedures in order to determine whether a filer’s expectation that a reseller is contributing is “reasonable.”¹

XOCS respectfully submits that the Commission should direct USAC to consider all relevant information submitted by a filer during the audit process – including sworn declarations signed by resellers of the filer – that demonstrate that the filer’s revenues should be treated as wholesale revenues. The Commission should affirm that sworn declarations from resellers may, in conjunction with other evidence of the filer’s due diligence in qualifying its resellers, be sufficient to show that revenues are properly classified as wholesale revenues.

¹ XOCS submits that it is not even necessary to address this question to resolve the “Other Matter” in the XOCS audit, because USAC’s records confirming the resellers’ contribution status are sufficient, by themselves, to confirm XOCS’s classification of the revenue as reseller revenue.

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XO Communications Services, Inc. (“XOCS”), through its undersigned counsel, respectfully submits these comments in response to the *Public Notice* seeking comment on the Universal Service Administrative Company’s (“USAC’s”) March 1, 2011 letter requesting guidance on an issue relating to the reseller verification process.¹

USAC’s Guidance Request arises at least in part from a recently-concluded audit of XOCS’s USF filings.² As a result, XOCS has direct knowledge of the circumstances

¹ *Public Notice*, Comment Sought on Universal Service Administrative Company’s Request for Universal Service Fund Policy Guidance, WC Docket No. 06-122, CC Docket No. 96-45, DA 11-432 (rel. Mar. 7, 2011); *see* Letter from Richard A. Beldon, Chief Operating Officer, USAC, to Sharon Gillett, Chief, Wireline Competition Bureau, FCC, Mar. 1, 2011 (“Guidance Request”).

² *See In re: XO Communications Services, Inc. Request for Review of Decision of the Universal Service Administrator*, WC Docket 06-122 (filed Dec. 29, 2010) (“Request for Review”). The issue presented in the Guidance Request was identified as an “Other Matter” in XOCS’s audit. As XOCS explained in the Request for Review, XOCS did not appeal the “Other Matter” because it was not an “action taken” by the Administrator that “aggrieves” XOCS. 47 C.F.R. § 54.719(c); *see* Request for Review at n. 3. As USAC

surrounding the issue on which USAC seeks guidance. USAC has materially mis-stated both the question(s) to be answered and the facts surrounding the relevant questions. XOCS urges the Commission not to accept USAC's purported "non-confidential summary" and instead to address the full scope of the issues, as described herein.

XOCS respectfully submits that, upon consideration of the true context in which the questions arise, the Commission should prohibit USAC from reclassifying reseller revenue as "end user" revenue in circumstances where USAC's own records confirm that the reseller in question did, in fact, report its revenues and contribute to the USF during the relevant period. This prohibition is particularly warranted where, as in the case of XOCS, the filer has "actual knowledge" that the reseller contributed to the USF during the relevant period. USAC must be prohibited from knowingly double collecting USF contributions, as it originally proposed with respect to XOCS.

In addition, the Commission should direct USAC to consider all relevant information submitted by a filer during the audit process – including sworn declarations signed by resellers of the filer – that demonstrate that the filer's revenues should be treated as wholesale revenue. The Commission should affirm that sworn declarations from resellers may, in conjunction with other evidence of the filer's due diligence in qualifying its resellers, be sufficient to show that revenues are properly classified as wholesale revenues.

I. USAC'S GUIDANCE REQUEST FAILS TO INCLUDE ALL RELEVANT FACTS

The Guidance Request states that it "provides a non-confidential summary of a policy guidance request previously presented to [FCC staff]." Although the issue arose in USAC's audit of XOCS and was identified by USAC as an "Other Matter" in the XOCS audit,

explained in the Guidance Request, guidance is sought in order "to determine whether a violation of the Rules has occurred." Guidance Request at 1.

XOCS was not advised of the Guidance Request before it was presented to the FCC, nor was XOCS consulted in order to ensure that the submission was complete.³ In fact, the Guidance Request fails to completely or adequately present the question on which guidance is needed in connection with the XOCS audit. USAC's purported summary omits key information relating to the reseller documentation that XOCS maintained, mis-states the basis for USAC's concern about XOCS's documentation and inaccurately describes the sworn declarations as "post-dated certificates." In addition, USAC withholds the key fact that the sworn declarations at issue were, in every instance implicated here, submitted by carriers that USAC's own records confirm were contributors to the Fund during the audit period. Rejection of these sworn declarations thus would knowingly lead to a double assessment of USF on the wholesale revenues at issue.

A. The XOCS Audit

The situation implicated by the Guidance Request is unique in one significant way. In all previous audits, USAC tested reseller revenues via a three-step process. First, USAC obtained a list of customers classified by the filer as resellers. Second, USAC compared that list with its list of contributing carriers for the year(s) being audited. If the reseller had contributed during the relevant year(s), USAC confirmed the filer's classification of that particular reseller. If the reseller had not, then USAC proceeded to step three to examine whether the filer's verification procedures established a "reasonable expectation" that the (non-contributing) reseller would contribute to the Universal Service Fund.

In XOCS's audit, however, USAC did not follow the three step process that it had used for all previous contributor audits. Instead, for the first time, USAC ignored its own

³ XOCS understands that the Commission has received a complete copy of the USAC audit report for XOCS, including the "Other Matter" relating to this issue. However, the Guidance Request states it is a summary of a request "previously presented" to the FCC staff. Other than the "Other Matter" included within XOCS' audit report, XOCS is not aware of any such request having been presented to the Commission.

contribution records and proposed to reclassify revenue as “end user” revenue even if the reseller was confirmed to have contributed to the Fund during the audit year.⁴ Initially, USAC proposed to reclassify the vast majority of XOCS’s total wholesale revenue as “end user” revenue even though most of this amount was attributable to revenue from confirmed resellers. Indeed, as XOCS explained in the audit, approximately 80 percent of the amount USAC initially sought to reclassify was attributable to a handful of large, nationally known carrier-customers.⁵ Moreover, the primary reason that USAC proposed to reject the XOCS classification was due to recordkeeping issues – specifically, that although XOCS had reseller certifications with valid language, the certifications were not signed during the audit year (and, to a lesser extent, that XOCS did not maintain printouts showing the USAC filer database report for each reseller).⁶

Faced with USAC’s proposal to double collect USF contributions on a substantial amount of wholesale revenue, XOCS contacted each of the resellers and asked them to complete a confirmatory certification to supplement the certification it previously had provided.⁷ These confirmatory certifications were sworn declarations from the resellers, signed under penalty of perjury. The certifications contained the language recommended in the Form 499-A Instructions to confirm that the customer (or where the customer is an intermediate wholesale provider, the customer’s customer) (a) was purchasing telecommunications service from XOCS for

⁴ USAC staff confirmed in the Exit Conference that its procedures represented a first-time departure from past practice, but did not explain why such a reversal of administrative policy was perceived as necessary.

⁵ See XOCS Audit Report, Detailed Audit Finding #2 (Reseller Revenue), at 6-7 (identifying nationally known carriers that USAC proposed to classify as “end users”), attached as Confidential Exhibit 1.A to XOCS Request for Review.

⁶ For example, one recurring issue is that XOCS obtained from its customer a proper reseller verification with no stated expiration date when entering a multi-year wholesale service agreement, but XOCS did not obtain refreshed verification statements annually thereafter during the term of the wholesale service agreement.

⁷ USAC refers to these confirmatory certifications as “post-dated certificates,” but there is nothing post-dated about them. See, *infra*.

incorporation into its own end user services and (b) had contributed to the Universal Service Fund based on its revenues. The certifications differed from a customary reseller certification only in that the customer submitted a sworn declaration confirming what it, in fact, had done in the relevant year, rather than what it intended to do in the upcoming year.

Importantly, the confirmatory certifications were not the only evidence on which XOCS relied to demonstrate that its classifications were appropriate. As XOCS explained in its appeal of the audit, XOCS followed long-standing documented procedures for identifying the services provided by its customers and for confirming that the customers contributed directly to the FCC's USF program.⁸ Upon receipt of a request for a USF exemption, XOCS's Customer Care or Sales department would send an exemption certificate that included language confirming that (a) the customer was purchasing telecommunications services for resale as telecommunications to end users and (b) the customer would contribute directly to the USF. The exemption language complied with the guidance provided in the FCC Form 499-A Instructions and was sufficient to confirm that the customer was a reseller of telecommunications services and could be expected to contribute directly to the USF.

Pursuant to XOCS's process in place at the time, certificates were collected when the reseller customers established service, contained no expiration dates, and remained valid for the entire term of the associated service agreement. Although this process did not strictly comply with the guidance in the then-current Form 499-A Instructions -- which had been modified the year before to recommend annual certifications -- five of the certificates reviewed by USAC actually were signed during the audit year, seven were executed in the year prior, and none pre-dated 2001.

⁸ See XOCS Request for Review, at 30-32.

USAC staff told XOCS that USAC did not find fault with the *substance* of the certifications that XOCS possessed, nor with any of the remaining procedures XOCS used to identify reseller customers. Instead, USAC based its proposal to reclassify the revenue on the fact that the certifications were not signed in the year in which revenues were reported. To the best of XOCS's knowledge, this is the basis for USAC's assertion in the Guidance Request that the filer lacked "appropriate documentation" as required by the Rules.⁹

The confirmatory certifications obtained during the audit were simply one additional piece of evidence to demonstrate that XOCS appropriately classified the revenues at issue and that reclassification of the revenues would erroneously result in a double recovery of USF contributions. Moreover, such certifications show that XOCS's procedures produced a reasonable expectation. The purpose of the certifications was to remove *any* residual doubt concerning whether the reseller customers at issue in fact paid USF directly on the associated revenues during the audited year. Because USAC questioned that the prior certifications might no longer be valid, XOCS submitted the sworn declarations to demonstrate that the facts certified prior to the audit year in fact had remained valid. As a result, upon receipt of the confirmatory certifications, USAC now had two pieces of evidence confirming that the proper USF contributions were made – first in its own contribution records for the audit year and second through the reseller's sworn declaration.¹⁰

Thus, it is not accurate, as the Guidance Request suggests, to assert that a confirmatory certification would, by itself, be relied upon to demonstrate the proper

⁹ See Guidance Request at 1-2.

¹⁰ This situation contrasts sharply with that presented in *Global Crossing* – and indeed in all previous reseller verification audits – where the customers in question were not contributors. *Request for Review of Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc.*, Order, 24 FCC Rcd 10824 (WCB 2009) ("Global Crossing Order"). Unlike those previous audits, in the XOCS audit, USAC sought to reclassify revenue from contributing resellers.

classification of the revenue. Instead, the confirmatory certification would be submitted as additional evidence demonstrating actual knowledge and/or a “reasonable expectation” that the customer would contribute. USAC’s request for guidance fails to acknowledge this key fact.

B. The Questions Presented Should be Restated

In light of the additional factual context provided above, XOCS submits that the questions presented should be amplified and restated as follows:

First, the immediate question involves XOCS’s own certifications. This immediate issue implicates the prohibition on double recovery of USF on both wholesale and retail revenues. Specifically, where USAC’s own records demonstrate that a reseller has contributed directly to the USF, may USAC lawfully ignore sworn declarations that a customer has paid USF contributions on the revenues in question and knowingly double collect USF contributions on the same revenue?

The second issue raised by the Guidance Request concerns the obligation of USAC to consider “other reliable proof” submitted by a filer to support its classification of revenues as reseller revenues. As to this issue, USAC inaccurately portrays the situation as one in which a filer seeks to substitute a sworn declaration for a lack of reseller verification procedures. However, the true question is, “May a filer may submit sworn declarations from its reseller customers as additional evidence to demonstrate, in conjunction with contemporaneous evidence of its reseller verification procedures, that its expectation the reseller would contribute is reasonable?”

XOCS addresses these questions below.

II. IT IS UNLAWFUL FOR USAC TO REJECT CARRIER EVIDENCE OF RESELLER CLASSIFICATIONS WHEN USAC’S RECORDS CONFIRM THAT THE ENTITY IS A CONTRIBUTOR

The FCC clearly prohibits USF assessments on both wholesale and retail revenues. From the outset of the USF program, the FCC has been careful to assess USF only on end user telecommunications revenues in order to avoid double payment of the contribution by both the wholesale and retail carriers.¹¹ In the case of telecommunications services sold at wholesale, the Commission “relieve[d] wholesale carriers from contributing directly to the support mechanisms [on revenues collected from resellers].”¹² As the FCC explained, “basing contributions on gross telecommunications revenues creates a double-payment problem for resold services and thus is not competitively neutral.”¹³

In light of this prohibition, it is unlawful for USAC to propose to reclassify revenue received from resellers confirmed by USAC records to have contributed to the Fund in the relevant year(s). In response to the immediate question posed by the sworn declarations, the Commission should require USAC to accept evidence confirming this payment status as evidence supporting the filer’s revenue classification.

A. Where USAC’s Records Show Contributions by a Reseller, USAC May Not Reclassify Revenues as “End User” Revenues

The Guidance Request asks how USAC should consider additional evidence submitted by the filer during an audit. This question should never arise, however, when the resellers in question are confirmed by USAC’s own records to be direct contributors themselves.

¹¹ See *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 9206-9207, ¶ 844 (1997) (“*Universal Service First Report and Order*”); 47 C.F.R. § 54.706(b).

¹² *Universal Service First Report and Order*, 12 FCC Rcd at 9207, ¶ 846.

¹³ *Id.*, ¶ 847.

In a situation where USAC can confirm that the reseller in fact was a contributor, there is no basis on which USAC may reclassify revenue from that entity as “end user” revenue.

The fact that USAC even asks the question (though it withheld the fact that the resellers were confirmed to be contributors) demonstrates a fundamental misapprehension of the audit role. USAC’s primary function in a contributor audit is to verify compliance with the program’s contribution rules. USAC’s new audit procedure, however, turns the quest for accurate collection of USF on its head. Instead of verifying whether a reseller has contributed to the Fund, USAC appears to be more interested in identifying instances in which filers have not strictly adhered to recordkeeping guidance included in the Form 499-A Instructions and attempting to boost USF collections by double collecting USF on the basis of a recordkeeping lapse. This game of “gotcha” is being pursued without regard to whether the Fund receives the contributions it is supposed to receive, and without regard to the fundamental accuracy of the resulting conclusion.

A USF audit must first and foremost be about verifying whether the proper amounts were contributed to the Fund. Where USAC can confirm that a reseller has contributed directly, then there is no basis for USAC to propose to reclassify as “end user” revenue the revenue received from that reseller. Thus, even if USAC concludes that a wholesale carrier does not maintain “appropriate documentation” on its resellers, USAC should not need additional confirmatory evidence – whether in the form of a certification or some other evidence – to conclude that the revenues may be listed by the filer as wholesale revenues.

This does not mean that USAC is barred from identifying where a filer’s recordkeeping differs from the guidance included in the Form 499-A Instructions. Such deviations can be noted in an audit, most likely as an “Other Matter” under USAC’s criteria,

because the practice would not be material where the resellers in fact contributed to the Fund.¹⁴ However, the *remedy* for any recordkeeping deficiency cannot be the reclassification of revenue to the “end user” category. To allow a recordkeeping deficiency always to lead to reclassification would undermine the function of an audit and would lead to massive over-collection of USF contributions. USAC may not knowingly propose this result. Therefore, whenever USAC can verify in its own records that a reseller is a contributor, that should be the end of the reclassification inquiry. Or, to put it in the reseller terminology, where USAC can verify that a reseller has contributed to the Fund based on its reported revenues, this fact is sufficient to establish “actual knowledge” of the resellers contributor status and also that a filer’s expectation that the reseller would contribute is “reasonable.” No additional evidence is necessary to justify classification of the revenue as wholesale revenue.

B. USAC Must Accept a Confirmatory Certification that is Consistent with its Own Records

In any event, USAC must consider all relevant evidence submitted to it. This obligation includes the obligation to accept evidence that is consistent with USAC’s own records.

In the Guidance Request, USAC appears to suggest that it cannot determine from certifications such as those submitted by XOCS whether the resellers were incorporating the services purchased into their own telecommunications offerings and were contributing based on revenues derived from these offerings.¹⁵ By this question, XOCS understands USAC to say that it can verify that a reseller has contributed on *some* revenues, but not necessarily on the revenues that were derived from the resold operations.

¹⁴ See Guidance Request at 1 (explaining USAC’s criteria for deeming an issue an “other matter”).

¹⁵ See Guidance Request at 2-3.

Others have raised considerable doubt as to whether such a service-by-service analysis is required or even possible.¹⁶ But even if it is necessary to obtain additional information beyond what USAC's own records show, sworn declarations such as XOCS's confirmatory certifications would suffice. XOCS's confirmatory certifications bridge the gap between the fact of contributions on some revenue (shown by USAC's records) and contributions based on incorporation of XOCS services (shown by the language of the certification). Where such evidence is consistent with USAC's own records, USAC is obligated to accept and consider this additional evidence. Thus, at least in the case of resellers confirmed by USAC as contributors (as was the case in the XOCS audit), USAC is obligated to accept certifications signed by these entities.

It is important to recall that XOCS was forced to seek these confirmatory certifications only because USAC unilaterally changed its procedures after the relevant filing year and proposed to reclassify revenue from customers that its own records confirmed were USF contributors. Were it not for USAC's proposal to double-collect USF contributions on these revenues, there would have been no need for this evidence. However, once USAC embarked on this path, it would be unlawful for USAC to ignore evidence that supports XOCS's classification of the revenues.

¹⁶ Opposition of U.S. TelePacific Corp. d/b/a TelePacific Communications to Petition for Clarification or in the Alternative for Partial Reconsideration, Request for Review of a Decision of the Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific d/b/a TelePacific Communications, WC Docket No. 06-122, at 10 (filed July 6, 2010) ("Requiring TelePacific to contribute to USF indirectly on a circuit-by-circuit basis is inconsistent with Commission rules and FCC Form 499 Instructions that classify revenues as wholesale on an entity-by-entity basis").

III. CONFIRMATORY CERTIFICATIONS MAY BE ACCEPTED TOGETHER WITH OTHER EVIDENCE SUPPORTING THE FILER'S REASONABLE EXPECTATION

The second question raised by the Guidance Request concerns whether sworn declarations submitted during the audit process can be considered as “other reliable proof” of the filer’s classifications. This issue should be moot in the specific context of the related “Other Matter” in the XOCS audit, because USAC’s contribution records confirm that the resellers in question in fact contributed to the Fund. Nevertheless, this issue could arise in future audits because USAC rigidly applies the Form 499-A Instructions as the sole permissible method of verification – in clear violation of the FCC’s orders – and routinely rejects a filer’s “reasonable expectation” based on minor recordkeeping lapses.¹⁷ In a likely scenario, the filer would have employed verification procedures that, while not precisely satisfying the “safe harbor” in the Instructions, nevertheless showed due diligence in classifying its revenues as reseller revenue. In such cases, the role of a sworn declaration would be to provide further evidence that the level of due diligence was sufficient, and to demonstrate satisfaction of the “actual knowledge” standard or to show that the filer’s expectation the reseller would contribute was reasonable.

In response to this longer term issue, the Commission should confirm that such certifications may, in conjunction with other evidence, be sufficient to demonstrate a “reasonable expectation” that the reseller would contribute directly to the Fund.

A. USAC is Obligated to Accept “Other Reliable Proof” of a Wholesale Carrier’s Classification of Revenues

Wholesale carriers may properly claim the reseller exemption if *either* they have “affirmative knowledge” that their customer is contributing directly to the universal service fund,

¹⁷ For example, in examining XOCS’ procedures, USAC concluded XOCS’s reseller certifications were deficient solely because they were signed prior to the audit year (in many instances, only a few months prior) and faulted XOCS for not retaining annual printouts of the USF filer database reports on each reseller.

or they can demonstrate a "reasonable expectation" that the customer in question contributed directly to the universal service fund with respect to the resold services.¹⁸ While the Form 499-A instructions provide "guidance" on one possible way to meet these standards -- *i.e.* by maintaining records in strict accordance with the safe harbor procedures outlined therein -- the FCC stated explicitly in *Global Crossing* that carriers may establish their affirmative knowledge or reasonable expectation by providing "*other reliable proof*."¹⁹ Indeed, the FCC made clear that USAC is obligated to consider and weigh alternative evidence of affirmative knowledge or reasonable expectation submitted by wholesale carriers to show that their reseller customers contribute directly to the universal service fund.²⁰

The Wireline Competition Bureau reiterated this view in its *TelePacific Order*, where it further clarified that obtaining annual certifications of contributor status is one "common way" for wholesale carriers to verify reseller status, but that "[o]ther evidence...may also be used to establish the necessary expectation."²¹ Similarly, in the *NetworkIP Order*, the Bureau acknowledged that "the Commission does not dictate what procedures a carrier must implement to meet the 'reasonable expectation' standard, the agency has provided guidance in the FCC Form 499-A instructions to assist wholesale carriers regarding how to satisfy the reasonable expectation standard."²²

¹⁸ *Global Crossing Order*, 24 FCC Rcd at 10827 (¶ 11).

¹⁹ *Id.*, at 10828-29 (¶ 14).

²⁰ *See, id.*, 10828-29 (¶¶ 12 & 14).

²¹ *Request for Review of the Decision of the Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific Corp.*, Order, 25 FCC Rcd 4652, 4655 n. 22 (WCB 2010).

²² *Request for Review of Decision of the Universal Service Administrator by Network Enhanced Telecom, LLC*, Order, 25 FCC Rcd 14533, 14536 (¶8) (WCB 2010).

Thus, it is clear that wholesale carriers are free to offer any "reliable proof" that their reseller customers (or, where the reseller customer is an intermediate wholesale carrier, the customer's customer) purchased services for resale and contributed to the universal service fund. There is no restriction on the type of evidence collected and no requirement that only documents created before the service was even rendered be used. Although the Guidance Request grudgingly acknowledges the ability of a filer to "provide additional documentation" to support its revenue classifications, the request itself underscores USAC's reluctance to follow the Commission's direction.²³ Put simply, USAC is required to consider any and all reliable proof of the classification, regardless of whether the proof is of a kind specifically mentioned in the Instructions or whether the proof complies exactly with the Instructions' requirements. Ultimately, it is USAC's job (subject to Commission review) to determine whether the proof is sufficient to demonstrate that the revenues are properly classified as reseller revenues.

B. Confirmatory Certifications are Reliable Evidence

Sworn declarations of the type described can be relevant evidence supporting the classification of revenues. Confirmatory certifications obtained from reseller customers can offer quite reliable evidence, precisely because they are executed after the events in question and can report accurately as to the facts that occurred. For example, in the case of the XOCS confirmatory certifications, they contain all of the language otherwise required of prospective certifications. They state that the services obtained from XOCS were "purchase[d] for resale in the form of telecommunications or interconnected Voice over Internet Protocol service." Such

²³ Guidance Request at 2.

language zealously tracks the language affirmatively recommended by the FCC for reseller certifications.²⁴

The confirmatory certifications are sworn statements from reseller customers that establish exactly what transpired during the audited year. They require the reseller customers to review their own practices and verify that, during the audited year, they purchased wholesale telecommunications services from filer that were integrated into their offerings for purposes of resale as retail telecommunications or interconnected VoIP services. Critically, resellers that sign the forms further verify that they (or their own customers) directly reported revenues and contributed to the universal service fund during the audited year, and that they reported their retail revenues on their own Form 499-A submissions accordingly. The verifications are sworn statements by responsible officials with knowledge of the situation. Accordingly, the "proof" actually is far more than "reliable"; it in fact constitutes "best evidence" of what occurred. They establish virtually beyond question that the actual governing FCC rules and policies -- which require that USF contributions be paid on end user services, not resold services -- were complied with fully.

Indeed, the confirmatory certifications collected by XOCS actually constitute far more "reliable proof" than the annual verifications permitted as a safe harbor option in the Form 499-A instructions. Since the reseller certifications envisioned by the Instructions are collected sometime during the year in which service is provided, they amount to a statement of intent by the reseller customer -- *i.e.* that the customer intends to incorporate the purchased services into their own retail offerings throughout the entire year, and report it as assessable revenue on their own Form 499-A the following year. By contrast, the confirmatory certifications collected by

²⁴ See Form 499-A Instructions, p. 19.

XOCS are sworn statements of what actually occurred during the audited year -- *i.e.* resellers were required to state that they (or their customers) in fact incorporated the purchased services into their own retail offerings and reported the associated retail revenue for USF contribution purposes. The statements effectively *re-confirm* the customer's reseller status and compliance with FCC rules during the audited year. The intention is, together with the other body of evidence of reseller status previously submitted, to remove any residual doubt concerning whether the resellers at issue (or their customers) in fact made USF contributions in connection with the services in question. To ignore the weight of such retroactive verifications would be tantamount to a trial judge ruling at trial that file memos predicting an event are admissible whereas live sworn testimony describing the actual occurrence is not.

The use of sworn retroactive reseller verifications of the truth of what happened during the audited period dovetails nicely with the FCC's analysis contained in the *Global Crossing Order*. In *Global Crossing*, the Commission made clear that annual certifications were not the only way to reasonably demonstrate reseller status, and that wholesale carriers are free to show that their reseller customers qualified for exemption through "other reliable proof." The Commission then went on to agree with USAC that "outdated certifications, contract provisions, company website information and product description" submitted by Global Crossing to support its classification of non-contributors was inadequate, which leaves unanswered what would be considered adequate in other circumstances, in particular, in circumstances where the resellers are confirmed to be contributors.²⁵ While there may be a variety of alternative proofs that could be offered (*e.g.*, tax exemption forms, more contemporaneous customer certifications, evidence of inclusion in contemporaneous USAC filings), what could possibly be better than sworn

²⁵ *Global Crossing Order*, 24 FCC Rcd at 10828-29 (¶ 14).

verifications by the reseller customers of how they actually used and reported on the services purchased during the audited period? Thus, XOCS submits that the use of such retroactive proof is exactly the kind of "other reliable proof" envisioned by the Commission.

USAC's Guidance Request simply ignores the clear admonition given by the FCC in the *Global Crossing Order* that USAC should "not treat the guidance in the Commission's instructions as a binding rule."²⁶ Importantly, the FCC's stated position on this point is as it must be. It would violate the Administrative Procedures Act ("APA") if USAC were to apply the instructions as if they were binding rules. In delegating authority to the Wireline Competition Bureau to publish the Form 499-A instructions, the FCC explained that the delegation extended only to the "the administrative aspects of the reporting requirements, not to the substance of the underlying programs."²⁷ The Wireline Competition Bureau lacks authority to adopt substantive changes to the rules via the instructions. Moreover, the Bureau announces the new Form 499-A and instructions each year without following the notice and comment procedures that would be required by the APA if the Bureau were adopting binding rules. Thus, the instructions *cannot* be enforced as though they are binding rules because they do not meet the requisite procedural requirements for regulations found in the APA. USAC must, therefore, accept and faithfully consider additional evidence submitted by a filer, including sworn declarations such as XOCS's confirmatory certifications.

²⁶ *Global Crossing Order*, 24 FCC Rcd at 10830 (¶ 16).

²⁷ *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, 14 FCC Rcd 16602, 16621, ¶¶ 39-49 (1999).

C. Certifications Attesting to Past Facts are not “Post-Dated” Certificates

USAC’s description of the sworn declarations as “post-dated” is incorrect. Post-dating refers to the practice of dating a document (such as a check) with a date after the actual date on which the document was signed. There is nothing “post-dated” about the sworn declarations obtained by XOCS during the course of the audit. The certifications are dated with the actual date on which they were signed, and speak to past events based on the signatory’s own personal knowledge.

Moreover, there is nothing improper about the use of a sworn declaration to confirm past events. There is absolutely no attempt to create a new or different business relationship between XOCS and its reseller customers than what actually occurred during the audit period. Nor is there an attempt to assign past consequences to actions based on the new certification. Instead, the sworn certifications simply confirm the truth of what transpired during the audited period. Thus, the verifications take the guesswork out of the audit process and ensure a correct result.

D. There is No Risk of Underpayment by Acceptance of Confirmatory Certifications

Although USAC is supposed to seek guidance only, not to advocate a policy position before the Commission, the Guidance Request expresses concern that acceptance of sworn declarations during the audit process may lead to underpayment of USF.²⁸

Specifically, USAC asserts that a contributor relying on sworn declarations submitted during an audit may underpay USF contribution obligations. It further speculates that contributors would be encouraged to create documentation “after the fact” and ultimately to

²⁸ Guidance Request at 3; *see* 47 C.F.R. § 54.702(d) (USAC may advocate before the Commission only on administrative matters).

under-report revenue subject to USF contribution obligations. USAC's concern is wholly unfounded.

First and foremost, confirmatory certifications such as those submitted by XOCS do nothing to alter whether the reseller actually contributed to the Fund. A reseller that did not actually contribute, or that did not have knowledge that each of its customers contributed, could not validly sign such a certification (at least, could not sign the certifications submitted by XOCS). If the reseller (or its customers) had contributed, then the sworn declaration merely confirms that proper payments were made, and that the Fund has received the contributions that were required.²⁹ If, on the other hand, a reseller did improperly sign a certification, USAC (and the Commission) would have sufficient powers to investigate and, if appropriate, require the contributions claimed by the reseller to be made. Nothing in the certifications, then, leads to under-payment of USF.

Further, the *Global Crossing Order* already permits a filer to submit evidence during the audit to demonstrate that its expectation was "reasonable." The certifications relevant to the Guidance Request are simply one example of the type of documentation that the Commission stated filers were permitted to provide. No legitimate concern over under-payment could result from the submission of proof that is reliable and relevant.

Finally, it is unlikely that the possibility of submitting additional evidence during an audit will lull filers into disregarding their USF contribution obligations. USAC makes no attempt to explain how the ability to submit additional evidence during the audit could lead to under-payment. Presumably, USAC means to say that it cannot audit every contributor, which certainly is true. But the risk of under-payment by unaudited contributors is the same regardless

²⁹ Indeed, at least in XOCS's audit, the sworn declarations were necessary to avoid a massive *over-payment* of USF, in violation of Section 254 and the FCC's Orders.

of whether USAC accepts additional evidence or not. It is the likelihood of an audit and/or FCC enforcement that contributes to whether the filer population as a whole complies with its obligations, not how USAC conducts its audits.

E. Confirmatory Certifications are Particularly Appropriate Where USAC Rejects Prior Certifications Based Solely on the Date They Were Signed

At the end of the day, USAC's only material objection to the use of sworn declarations is that they are submitted during the audit process, not created prior to the reporting period in question. Although this fact does not affect the reliability of the information (and indeed, may make it more reliable than a predictive certification), the concern is irrelevant in the specific context of XOCS's confirmatory certifications.

As discussed previously, USAC proposed to dismiss the reseller certifications in XOCS's possession prior to the audit solely because the certifications were dated prior to the audit year. In many instances, the certifications were executed only a few months prior to the period, which hardly renders them "outdated." Moreover, even for the older certifications, they did not possess an expiration date, and XOCS had no reason to believe that the underlying facts had changed in any way. Ultimately, USAC's own contribution records, supplemented by the confirmatory certifications obtained by XOCS, demonstrated that these underlying facts had not changed.

Where the only concern is the date on which the certification was signed, it is particularly appropriate for a filer to submit a confirmatory certification such as that submitted by XOCS. USAC's stated concern is that the "outdated" certification might not have been valid during the time period being audited. A filer's sworn declaration collected during the audit, however, responds directly to this concern. Sworn declarations such as the confirmatory certifications answer USAC's stated concern by demonstrating that, in fact, the prior

certifications remained valid during the audit period. Such declarations thus fill in the gap between the prior certification and the audit period, and are reliable proof that the filer's expectation of contributions was reasonable. Accordingly, particularly where the only concern is the date on which a prior certification was received, confirmatory certifications are appropriate.

IV. CONCLUSION

In order for the audit process to yield an accurate outcome, USAC must follow audit procedures that are designed to determine the correct classification of revenues. While recordkeeping requirements may be tested during the audit, USAC should not base reclassification decisions solely on the failure of a filer to adhere strictly to recordkeeping guidance included in the Form 499-A Instructions. Instead, USAC should use whatever information is available to it – including its own filing and payment records – to reach the most accurate reporting possible.

It follows that USAC may not knowingly double collect USF contributions when it knows that a reseller has contributed directly. It also follows that USAC should accept any “reliable proof” that can assist in reaching the proper result, including acceptance of sworn declarations that are signed and submitted during the audit process. For the above reasons, the Commission should (a) prohibit USAC from reclassifying revenue as “end user” revenue when its own records confirm that the reseller was a direct contributor during the relevant year(s) and (b) direct USAC to consider sworn declarations submitted during the audit together with other

evidence of the filer's reseller verification procedures submitted to support its classification of revenue as reseller revenue.

Respectfully submitted,



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